FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: COMMISSION SECRETARY

DATE: June 21, 2006

SUBJECT: COMMENT: DRAFT AO 2006-14
National Restaurant Association, PAC

Transmitted herewith is a timely submitted comment by Ms. B. Holly Schadler regarding the above-captioned matter.

Proposed Advisory Opinion 2006-14 is on the agenda for Thursday, June 22, 2006.

Attachment

Lichtman, Trister & Ross, PLLC

June 21, 2006

VIA FASCIMILE AND E-MAIL

Ms. Mary Dove
Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

RE: Comments on Draft Advisory Opinion 2006-14

Dear Secretary Dove:

This letter comments on the draft Advisory Opinions 2006-14 responding to the request of the National Restaurant Association Political Action Committee about a proposal to solicit contributions from the general public earmarked for Federal candidates and to collect and forward those contributions to the designated candidates. These comments are provided on my own behalf, not on behalf of any client, and are based on my experience as counsel to many political organizations regulated by the Federal Election Campaign Act.

The Law and Commission's Regulations Strongly Support Adoption of Draft C

We respectfully encourage the Commission to adopt Draft C prepared by the Office of the General Counsel. This draft correctly recognizes the role of a separate segregated fund and its ability, as distinguished from a connected corporation, to expressly advocate the election or defeat of clearly identified federal candidates and to solicit contributions to those candidates through communications with the general public. While an SSF and its connected organization are prohibited from soliciting contributions to the SSF from individuals outside the restricted class, there is no similar prohibition on an SSF soliciting contributions for federal candidates.

As the General Counsel acknowledges in Draft C, the regulations specifically contemplate that an SSF "may continue to solicit, collect and forward earmarked contributions to candidates . . ." *See* Explanation and Justification for 11 C.F.R. §114.2, Final Rule and Transmittal of Regulation to Congress, 60 Fed. Reg. 64260 (1995). Neither the regulations (at §§110.6 and 114) nor the accompanying Explanation and Justification suggest that an SSF should be treated differently than a nonconnected PAC in conducting this type of fundraising activity for federal candidates. When the Commission addressed a wide range of political activities conducted by corporations and their SSFs in 1995, it had the opportunity through the

rulemaking process to consider whether or not to impose additional restrictions on these types of solicitations by SSFs and clearly chose not to do so.

As further evidence of the Commission's intention to allow SSFs to conduct the activities proposed in NRA's request, the Explanation and Justification specifically states that the regulations on facilitation apply to communications both within and outside of the restricted class:

> Please note the new facilitation rules have been relocated to 11 CFR §114.2(f), since section 114.3 covers activities involving *only the restricted class, and facilitation can involve activities that are directed to the restricted class or that go beyond the restricted class.*

Fed. Reg. at 64264 (emphasis added). Thus, consistent with the General Counsel's conclusion in Draft C, the Commission specifically recognized that the types of solicitation activities permitted in §114.3, including soliciting earmarked contributions for candidates as provided in §114.2(f), would be conducted with an audience beyond the restricted class.

Draft A is Contrary to Existing Regulations and Law

Draft A incorrectly concludes that an SSF may not reach out to the general public to solicit contributions and transmit those funds to Federal candidates. The first reason given for prohibiting an SSF from raising earmarked contributions from the general public is that this activity would be equivalent to the SSF raising contributions from the general public for itself. The draft cites nothing in the Act of the regulations in support of this novel proposition. And, if soliciting earmarked contributions were the "equivalent" of raising direct contributions to a political committee, then all earmarking would be prohibited for nonconnected and connected PACs alike. Applying this logic, a nonconnected committee would be prohibited from soliciting earmarked contributions in excess of the limits that an individual may contribute directly to that committee.

The second reason given for prohibiting the proposed earmarking is equally flawed. The draft suggests that allowing a corporate SSF to serve as a conduit for contributions from individuals outside the restricted class would "disrupt the careful balance struck by Congress in the Act." Yet there is no indication of the origin or source of this broad policy. The draft simply suggests that permitting this activity might "permit an SSF to do indirectly what the Act prohibits the SSF from doing directly" or "enhanc[e] the influence of the SSF's connected corporation in Federal elections." As to the first point, the regulations at §110.6, which Draft A simply ignores, specifically permit earmarking of contributions as Draft C correctly explains.

In fact, Draft A disrupts the "balance" contemplated by Congress in the original Act, reaffirmed by Congress in the Bipartisan Campaign Reform Act, and articulated by the Supreme Court in *McConnell v. FEC*. This equilibrium places federal political committees – and particularly separate segregated funds – in an elevated position under the law. As the Court held in *McConnell*, "The PAC option allows corporate political participation without the temptation to use corporate funds for political influence . . . " 540 U.S. 93, 204 (2003) (quoting *FEC v.*

Beaumont, 539 U.S. 146, 163 (2003)). Or, as Senator John McCain stated during the BCRA debate, "[W]e have tried to, in the past, make it as easy as possible for political action committees to function, rather than make it more difficult." 147 Cong. Rec. S2553.

When it created SSFs, the competing interests Congress sought to balance were the political speech rights of corporations and labor unions on the one hand, and the associational rights of their shareholders and members to distance themselves from such speech. It is true, as Draft A suggests, that Congress was also concerned with balancing the aggregated wealth that certain groups could accumulate and disperse in the political system. But Draft A embraces a fundamentally wrong equation between general treasury and political activities that would call into question much of what SSFs lawfully do. As the Court stated in 1972, it is a "misapprehension" of the law to suggest "that the legislative purpose to eliminate the effects of aggregated wealth on federal elections reaches union- or corporation-controlled contributions and expenditures financed not from the general treasury, but from voluntary donations." *Pipefitters Local Union No. 562 v. U.S.*, 407 U.S. 385, 417. Thus, by seeking to prohibit SSFs from soliciting earmarked contributions from members of the general public, who could make a "free and knowing choice" to make such a contribution, Draft A seeks to strike a balance that Congress never intended.

Respectfully Submitted,

B. Holly Schadler

cc: Rosemary C. Smith, Associate General Counsel